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In the Supreme Court of the United States

OCTOBER TERM, 1993

IRENE M. IBARRA, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS

v.

DUC VAN LE, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the failure of the State of Colorado to provide home and community-based health care services to mentally ill Medicaid recipients that it provides to other groups of Medicaid recipients, but does not provide to Medicaid recipients generally, violates Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1988 & Supp. IV 1992).

2. Whether the failure of the State of Colorado to seek a federal waiver permitting it to provide home and community-based health care services to mentally ill Medicaid recipients that it provides to other groups of Medicaid recipients, but does not provide to Medicaid recipients generally, violates the Equal Protection Clause of the Fourteenth Amendment.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In November 1988, respondent Duc Van Le filed a class action in state court (District Court, City and County of Denver) against various state officials alleging that Colorado's failure to operate a Medicaid home care program for persons with mental illness is contrary to Section 1915(c) of the Social Security Act of 1935, 42 U.S.C. 1396n(c) (1988 & Supp. III 1991), and violates Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1988 & Supp. IV 1992), and the Equal Protection Clause of

the Fourteenth Amendment. Pet. App. A1-A2. The court certified a class consisting of:

> Low income mentally ill residents of Colorado who, because of their mental illness, qualify for skilled or intermediate care under Title XIX of the Social Security Act, but who have been and are being deprived by the State of Colorado of home and community based services under Title XIX * * * solely on the basis of their mental illness, although such services are provided to physically disabled adults.

Pet. App. A2.

2. Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, known as "Medicaid," authorizes the Secretary of Health and Human Services to make financial support available to States that have submitted approved plans to furnish

> (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care[.]

42 U.S.C. 1396.

Included within the definition of "medical assistance" for which federal reimbursement may be provided are: inpatient and outpatient hospital services; laboratory and X-ray services; nursing facility services; medical care and services provided by physicians and other health care professionals (such as dental care, physical therapy, private duty nursing, and services provided by a nurse-midwife or pediatric nurse practitioner); prescribed drugs, dentures, prosthetic devices, and eyeglasses; diagnostic, screening, preventive and rehabilitative services; services in an intermediate care facility for the mentally retarded; hospice care; case-management services; respiratory care

services; and certain types of home and community care. 42 U.S.C. 1396d (1988 & Supp. III 1991). Specifically excluded from this definition, and therefore from federal reimbursement, are services provided to persons between the ages of 21 and 65 who are in an "institution for mental diseases" (IMD). 42 U.S.C. 1396d(a)(1), (4), (14), (15), (16) (Supp. III 1991); 1396d(a)(B) (1988 & Supp. III 1991). An IMD is "a hospital, nursing facility, or other institution of more than 16 beds, that is primarily engaged in providing diagnosis, treatment, or care of persons with mental diseases, including medical attention, nursing care, and related services." 42 U.S.C. 1396d(i).

In addition to the covered services described above, Section 1915(c)(1) of the Act authorizes States, in certain circumstances, to include payment for home and community-based services (HCBS) for eligible individuals under their Medicaid plans. 42 U.S.C. 1396n(c)(1) (1988 & Supp. III 1991). Reimbursement for such services may be provided to individuals who otherwise "would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan." *Ibid.*

In order to obtain approval for an HCBS program, the State must demonstrate that the program is cost effective, *i.e.*, that the average per capita expenditure for home or community-based services would be less than the average per capita expenditure for Medicaid reimbursable care in a hospital, nursing facility, or intermediate care facility. 42 U.S.C. 1396n(c)(2)(D). Because Medicaid provides no reimbursement for patients between the ages of 21 and 65 who are in IMDs, the provision of HCBS benefits for such individuals under Medicaid would always require greater Medicaid expenditures than the provision of care for them in IMDs. Accordingly, IMD patients are ineligible for HCBS benefits.

In order to gain approval for an HCBS program, the State must obtain a waiver from the Secretary of Health and Human Services of certain otherwise applicable Medicaid requirements. 42 U.S.C. 1396n(c)(3). For example, under regulations promulgated by the Health Care Financing Administration (HCFA), the agency that administers the Medicaid program, each HCBS waiver must be limited to one of the three following "target groups or any subgroup thereof that the State may define," 42 C.F.R. 441.301(b)(6):

> (i) Aged or disabled, or both.
>
> (ii) Mentally retarded or developmentally disabled, or both.
>
> (iii) Mentally ill.

Under these regulations, HCBS benefits are not generally made available to all Medicaid recipients in a State, but only to certain groups. For that reason, in order to operate an HCBS program, a State must obtain a waiver of the Medicaid "comparability" requirement, which provides that assistance made available to an eligible individual "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." 42 U.S.C. 1396a(a)(10)(B)(i).[1]

3. From 1982 to 1985, the State of Colorado operated HCBS waiver programs for (1) persons with physical disabilities and elderly persons, (2) persons with developmental disabilities, and (3) persons with mental illness. Resp. App. A, at 5. In 1985, the State applied for an extension of its waiver to provide HCBS to individuals with mental illness. HCFA denied the waiver request

[1] The other requirements that may be waived are set forth at 42 U.S.C. 1396a(a)(1) (relating to state-wideness), and 42 U.S.C. 1396a(a)(10)(C)(i)(III) (relating to income and resource rules applicable in the community).

because it did not "fully comply with all of the statutory and regulatory requirements necessary for approval." Resp. App. A, Exh. 2. One of the reasons HCFA gave for denying the renewal was that, under its then-existing waiver program, Colorado was attempting to circumvent the statutory limitation on Medicaid benefits for individuals who, absent the waiver, would be patients in mental institutions (*id.* at 1):

> [T]he majority of waiver recipients are individuals * * * who were previously institutionalized in an IMD. The State attempted to circumvent the Federal prohibition by holding individuals released from inpatient psychiatric care for 15 days before placing them in the waiver. However, it is HCFA's position that the State's "holding" procedure has no impact on the character of an individual recipient and that these are individuals who, absent the waiver, would be in an IMD and are, therefore, not eligible for Medicaid benefits.

Thus, Colorado was unable to demonstrate the cost effectiveness necessary for a waiver. The State did not submit a revised application correcting this and other deficiencies identified by HCFA. Instead, the State terminated its HCBS program for persons with mental illness.

Since 1985, Colorado has continued to operate HCBS programs pursuant to Section 1915(c) waivers for the elderly and persons with physical disabilities, as well as for persons with developmental disabilities. Under its HCBS program for the elderly and persons with physical disabilities, Colorado provides home health care, personal care, respite care, nonmedical transportation, environmental home modification and electronic monitoring, and case management, homemaker, and adult day care services. Resp. App. A, at 6. The parties stipulated that "[t]hese same services would be of great benefit to" the named plaintiff and the class he represents. *Id.* at 6-7. In its 1985

waiver application, the State described these services as "essential * * * to the care and treatment of the long term * * * mentally ill population" and "to the containment of costs for skilled and intermediate nursing care for this population." Resp. App. A, Exh. 1. The trial court found that members of the plaintiff class need these services in order to remain in the community and avoid the "revolving door" of "hospitalization, nursing home placement, placement in the community, destabilization and re-hospitalization." Pet. App. A3.

The State admitted that it could submit a waiver request for persons with mental illness, that there is no alternative state program providing HCBS benefits equivalent to those delivered to the other populations, and that "[e]ven though Duc Van Le and the members of the plaintiff class meet all of the financial and medical screens for HCBS services, they have been and will be denied these services solely on the basis that their primary diagnosis is mental illness." Resp. App. A, at 7. The trial court found that the State could provide HCBS for very little cost because the federal government reimburses the State for 50% to 75% of costs, that the provision of such services would be substantially less costly to the State than unnecessary hospitalizations ($46 per day for HCBS, as compared with $400 per day for hospitalization, see Pet. App. A4), and that the State was underspending its authorized funding in its existing HCBS programs, *id.* at A5.

As a result of the State's failure to operate an HCBS program for persons with mental illness, at least 28 individual class members were specifically denied HCBS benefits. Resp. App. A, at 7. In addition, 635 persons whose primary diagnosis was mental illness resided in Medicaid-certified nursing homes in Colorado. *Ibid.*

4. Based upon the parties' detailed stipulations of fact and additional findings made after an evidentiary hearing, the district court held that the State was in violation of

Section 504 of the Rehabilitation Act of 1973 and the Equal Protection Clause of the Fourteenth Amendment. Pet. App. A15, A18-A19.

The court found that the HCBS provision of the Medicaid statute "does not limit participation in the HCBS waiver program to any specific category of persons who would otherwise be institutionalized"; that "there is no provision in the statute which authorizes states to offer HCBS programs for the elderly, blind and physically disabled while discriminating against eligible mentally ill persons solely on the basis of the nature of their disability"; and that "the statute establishes a single, unified HCBS waiver program for all otherwise eligible persons who, without the provision of such services, would require hospitalization, or skilled or intermediate nursing home care." Pet. App. A6. On this basis, the court concluded that Colorado was violating Section 504 because it was denying home and community based services to individuals with mental illness solely because of their handicap. *Id.* at A15.

The court also concluded that an equal protection violation had been established under both a strict scrutiny analysis and a rational basis analysis. Pet. App. A18. For purposes of strict scrutiny, the court held that persons with mental illness are a suspect class, that the class members' interest in avoiding institutionalization is a fundamental liberty interest, and that the State had shown no compelling governmental interest to support the unequal treatment of persons with mental illness and similarly situated persons with physical disabilities. Pet. App. A18. Alternatively, the court held that even under a rational basis analysis, the State had failed to show that denial of HCBS benefits to the plaintiff class is rationally related to any legitimate governmental interest. *Ibid.*

5. The State appealed the trial court's judgment to the state court of appeals. The Supreme Court of Colorado granted certiorari before judgment, and reversed. Pet.

App. B1-B2. Following a petition for rehearing, however, the Supreme Court vacated its decision and ordered the case reheard. Resp. App. B. After rehearing, the Colorado Supreme Court divided evenly, thus affirming the trial court's judgment by operation of law. Pet. App. C1-C2.

DISCUSSION

The judgment below is incorrect. Colorado's failure to provide home and community-based services (HCBS) for its mentally ill population violates neither Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a) (1988 & Supp. IV 1992), nor the Equal Protection Clause of the Fourteenth Amendment. The judgment below, however, does not merit plenary review by this Court. The validity of the federal statutory and regulatory scheme for home and community-based services under the Medicaid program is not at issue, and the state district court's decision would not affect the administration of the Medicaid program or federal government action on any waiver request that might be submitted by the State. In addition, there is no conflict among the federal courts of appeals or the highest courts of the various States that this Court must resolve. Because the Colorado Supreme Court affirmed by an equally divided court, the only opinion in this case is that of a state trial court. Therefore, the decision below has no precedential effect even in Colorado.

1. The trial court erred in concluding that the State's failure to operate an HCBS program for its mentally ill population violates Section 504. While the trial court was correct that the Medicaid statute itself "does not limit participation in the HCBS waiver program to any specific category of persons who would otherwise be institutionalized," Pet. App. A6, the statute plainly authorizes States to limit participation to individuals with particular conditions or diagnoses. A State that so limits its program does not violate Section 504, because, at least in the context of the Medicaid program, Section 504 does not

require that all services provided to one group of persons with disabilities also be provided to all other groups of disabled persons.[2]

a. The HCBS provisions of the Medicaid statute specifically permit States to operate waiver programs limited to groups of individuals with particular conditions or diagnoses, and thereby to deny HCBS to other individuals.[3]

The HCBS program permits States to provide specified services only if the Secretary waives certain otherwise-applicable requirements of the Medicaid program. See 42 U.S.C. 1396n(c)(3). Among the requirements that may be waived is the "comparability" provision, which requires that the medical assistance available to any eligible individual may "not be less in amount, duration, or scope than the medical assistance made available to any other such individual." 42 U.S.C. 1396a(a)(10)(B). Thus, a basic presupposition of the statutory waiver provision is that States will provide HCBS coverage to some Medicaid recipients, but not to others.

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[2] This case does not present the question whether a State that has made a distinction permitted by the Medicaid statute has nonetheless failed to comply with the Rehabilitation Act by acting on the basis of archaic or simplistic stereotypes. See *School Bd.* v. *Arline*, 480 U.S. 273, 285 (1987).

[3] The Medicaid statute denies federal reimbursement for services provided to patients in institutions for mental diseases (IMDs). 42 U.S.C. 1396d(a)(B) (1988 & Supp. III 1991). Together with the cost effectiveness requirements of the HCBS program, that provision has the effect of denying federal reimbursement for HCBS benefits furnished to persons with mental illness who would otherwise be in IMDs. That exclusion, of course, does not limit services provided to persons with mental illness who would *not* otherwise be in IMDs. In particular, it does not limit services for persons with mental illnesses who would not otherwise be in an IMD, but instead would be in a hospital, nursing facility, or intermediate care facility for the mentally retarded. See 42 U.S.C. 1396n(c)(1) (1988 & Supp. III 1991). See 42 U.S.C. 1396r(a) (defining nursing facility); 1396d(d) (defining intermediate care facility for the mentally retarded).

The authorization for a State to provide HCBS coverage to subgroups of Medicaid recipients is made more explicit by the statutory provisions explaining how a State may estimate per capita expenditures for purposes of establishing the cost effectiveness of its HCBS programs. Those provisions refer to waivers that apply "only to individuals with a particular illness or condition," 42 U.S.C. 1396n(c)(7)(A), "only to individuals with developmental disabilities who are inpatients in a nursing facility," 42 U.S.C. 1396n(c)(7)(B), and to "individuals with mental retardation or a related condition who are resident in an intermediate care facility for the mentally retarded," 42 U.S.C. 1396n (c)(7)(C) (Supp. III 1991). Thus, the text of the Medicaid statute itself makes clear that State HCBS programs may be limited to individuals with particular conditions or diagnoses.

The legislative history confirms Congress's intent to permit States to focus their waiver programs on certain groups. The HCBS waiver program was enacted as a part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357. In 1986, the statute was amended to make clear that a State could design an HCBS program targeted to people with AIDS or some other particular condition. At that time, Congress added the language, quoted above, that refers to waiver programs for individuals "with a particular illness or condition," 42 U.S.C. 1396n(c)(7)(A). According to the House Report on that amendment, "[t]he Committee bill makes clear that this optional [HCBS] benefit, *which can be limited* to certain regions of a State or *to certain covered groups*, may also be targeted specifically on individuals with AIDS or AIDS-related conditions." H.R. Rep. No. 727, 99th Cong., 2d Sess. 114 (1986) (emphasis added). The Conference Report similarly stated: "States are allowed to target their waivers to groups of individuals at risk of hospital care, as defined by illness or diagnosis (e.g., AIDS o[r] AIDS-related condition), or by condition (e.g., chronic

mental illness, ventilator dependency)." H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 401 (1986).

HCFA's regulations implement the statutory recognition that HCBS programs may be limited to groups of individuals with similar conditions or diagnoses. The regulations *require* States to apply for waivers separately for the elderly and for persons with physical disabilities, persons with mental retardation, and persons with mental illness, and *permit* them to apply for waivers for any of those groups or "any subgroup thereof that the State may define," 42 C.F.R. 441.301(b)(6).

b. A State that offers HCBS programs only to certain covered groups, as specifically authorized by the federal statutory and regulatory scheme governing the Medicaid program, does not thereby violate Section 504 of the Rehabilitation Act. Compare *Alexander* v. *Choate*, 469 U.S. 287, 302-303 (1985).

Section 504 provides:

> No otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794 (a) (1988 & Supp. IV 1992).

Section 504 does not automatically "require[] that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Traynor* v. *Turnage*, 485 U.S. 535, 549 (1988). In *Knutzen* v. *Eben Ezer Lutheran Housing Center*, 815 F.2d 1343 (1987), for example, the Tenth Circuit found that the owners of a federally subsidized housing project had not violated Section 504 by limiting participation in the project to the elderly and persons with mobility impair-

ments. The court first found the limitation to be consistent with, although not required by, the statute under which the project was developed, Section 202(a)(2) of the National Housing Act, 12 U.S.C. 1701q(a)(2). 815 F.2d at 1346-1352. The court then concluded that the plaintiffs, who had mental impairments, were not "otherwise qualified" for tenancy in the project because they were not elderly and did not have mobility impairments. *Id.* at 1353.

The Third Circuit reached a similar conclusion in *Doe* v. *Colautti*, 592 F.2d 704 (1979), finding no Section 504 violation in a Pennsylvania policy that limited Medicaid reimbursement for care in private mental hospitals, but not for care in private general hospitals.[4] The court reasoned that Section 504 does not require a recipient "to offer specialized treatment for particular handicaps," but rather to accord such treatment that it does offer "to the handicapped on a basis of equality with those not handicapped." *Id.* at 708-709, citing 45 C.F.R. Pt. 84, App. A, paras. 33, 36, 37.[5] The court found further support for its ruling in the "structure of the federal Medicaid program," which not only does not require States to pay for inpatient care in psychiatric hospitals, but affirmatively denies federal reimbursement for such care. 592 F.2d at 709, citing 42 U.S.C. 1396d(a)(14) and (16). The Third Circuit concluded that Section 504 was not intended

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[4] *Doe* v. *Colautti* was cited by the Court with apparent approval on this issue in *Alexander* v. *Choate*, 469 U.S. at 304.

[5] As explained in the Analysis of Final Regulation published by the Department of Health, Education and Welfare upon the adoption of its Section 504 regulations in 1977 (45 C.F.R. Pt. 84, App. A, para. 36):

> One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

to "obliterate the distinctions between the medical care a state medical assistance program must cover and the care it need not include." 592 F.2d at 710.

As the foregoing decisions demonstrate, Section 504 was not intended to expand the scope of existing federal health care programs or to "make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid." *Alexander* v. *Choate*, 469 U.S. at 307.[6] The federal program at issue here creates separate benefits packages for different groups of individuals who are eligible for Medicaid. Respondents are simply not "otherwise qualified" for the HCBS programs operated by the State of Colorado. The federal Medicaid statute permits States to operate HCBS programs limited to individuals with particular conditions or diagnoses, and thus to define eligibility for HCBS by reference to such

[6] Section 504 regulations promulgated by both the Department of Health and Human Services and the Department of Justice provide (45 C.F.R. 84.4(c); see 28 C.F.R. 39.130(e)):

> [T]he exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

Regulations issued by the Department of Justice to implement Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* (Supp. III 1991), include a similar provision (28 C.F.R. 35.130(c)):

> Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

The Analysis of this provision states that it is intended "to clarify that State and local governments may provide special benefits, beyond those required by the non-discrimination requirements of this part, that are limited to individuals with disabilities or a particular class of individuals with disabilities, without thereby incurring additional obligations to persons without disabilities or to other classes of individuals with disabilities." Americans With Disabilities Act Handbook, II-43 (Oct. 1991).

conditions. Members of the plaintiff class here are ineligible for Colorado's HCBS waiver programs because they are neither elderly nor physically or developmentally disabled. They therefore are not "otherwise qualified" for HCBS.

Similarly, respondents were not denied benefits "by reason of" their mental illness. Cf. *Traynor* v. *Turnage*, 485 U.S. at 549-550. To be sure, the parties stipulated that the class members were "denied these services solely on the basis that their primary diagnosis is mental illness." Resp. App. A, at 7. But there is nothing in the record to indicate that individuals who qualified for the program on the basis of their age or physical or developmental disability would be denied services solely because they also had mental illness. Indeed, the use of the term "primary diagnosis" suggests that those for whom mental illness is a secondary condition, but who are otherwise qualified (*i.e.*, who are elderly, or who have physical or developmental disabilities) would receive HCBS benefits. In short, respondents were denied HCBS benefits not "by reason of" their mental illness, but because they—like most Medicaid recipients in the State—are not among the narrow classes of individuals for whom such benefits are provided.

2. The district court also held that Colorado's failure to provide HCBS benefits for its mentally ill population violated the Equal Protection Clause. Pet. App. A16-A19. The court declared that "[t]he mentally ill are a suspect class for equal protection purposes," and that the plaintiff class members' "interest in living in a community setting, and being free from undue bodily restraint in institutional setting[s] such as hospitals and nursing homes, is a fundamental liberty interest." *Id.* at A18. Applying strict scrutiny, the court found that the State had not shown a "compelling governmental interest" in its policy, and therefore held that the policy violated the Equal Protection Clause. Pet. App. A18-A19. In the event that strict scrutiny did not apply, the court further found that the

"denial of HCBS benefits [was not] rationally related to any legitimate governmental interest." *Id.* at A18. Each of these rulings is erroneous.

a. This Court has already upheld, against equal protection and due process challenges, the denial of federally reimbursed Medicaid benefits to otherwise eligible individuals in institutions for mental diseases. *Legion* v. *Richardson*, 354 F. Supp. 456, 459 (S.D.N.Y.) (three-judge court), aff'd, 414 U.S. 1058 (1973); see also *Kantrowitz* v. *Weinberger*, 388 F. Supp. 1127 (D.D.C. 1974) (three-judge court), aff'd, 530 F.2d 1034 (D.C. Cir.), cert. denied, 429 U.S. 819 (1976). As in this case, those decisions involved a classification whereby some individuals suffering from mental illness were denied health-related benefits that were afforded to individuals suffering from other ailments. This Court's affirmance in *Legion* suggests that, whatever level of equal protection scrutiny is applicable to classifications affecting individuals with mental illness, provision of health benefits to individuals based on the type of illness from which they suffer does not violate the Equal Protection Clause.

b. The trial court erred in concluding that some form of heightened scrutiny is applicable to this case because the group with respect to which the State has allegedly acted —those with mental illness—constitutes a suspect or quasi-suspect class.

(i) Initially, it is not clear that the scheme at issue here actually classifies on the basis of mental illness. Most Medicaid recipients in Colorado do not fall within the narrow classes eligible for HCBS benefits (the physically disabled or elderly and the developmentally disabled), and most Medicaid recipients in Colorado are therefore ineligible for HCBS benefits. The basic distinction made in Colorado's scheme is between the narrow classes of Medicaid recipients who are eligible for HCBS benefits and the much larger class—including those suffering from mental illness and many other Medicaid recipients—who

are not. That scheme does not appear to classify on the basis of mental illness. Cf. *Schweiker* v. *Wilson*, 450 U.S. 221, 223-234 (1981) (holding that denial of SSI benefits to those residing in IMDs and others does not classify on the basis of mental illness).

(ii) Even if the Colorado program were regarded as establishing a classification based on mental illness, that classification would not be subject to heightened scrutiny in the circumstances of this case. The Court held in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), that mental retardation is not a quasi-suspect classification meriting heightened judicial scrutiny under the Equal Protection Clause. The reasons that the Court advanced to support that holding, see 473 U.S. at 442-447, would appear to apply as well to the claim that mental illness is a quasi-suspect classification. Indeed, the Court in *Cleburne* noted that it would be difficult to distinguish persons with mental retardation from a number of other groups—specifically including those with mental illness—who could advance a similar claim to heightened scrutiny. See 473 U.S. at 445-446. Thus, the Court's reasoning in *Cleburne* indicates that classifications involving persons with mental illness are not subject to heightened equal protection scrutiny.[7]

Subsequently, in *Heller* v. *Doe*, 113 S. Ct. 2637 (1993), the respondent argued that, although *Cleburne* had held that mentally retarded individuals are not a quasi-suspect class, the congressional findings and statement of purpose in the Americans with Disabilities Act (see 42 U.S.C. 12101 and 12102) amounted to a clear indication from Congress, acting pursuant to Section 5 of the Fourteenth

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[7] Respondents concede that "[t]he standard of review applied in *Cleburne*, with respect to classifications involving the mentally retarded, is applicable to the mentally ill." Br. in Opp. 35. See also *id.* at 37 ("this Court indicated that the rational basis test applied in *Cleburne* would be applicable to classifications that discriminated against the mentally ill").

Amendment, that all individuals with disabilities, including those with mental retardation, should now be treated as a suspect class. See 113 S. Ct. at 2651 n.1 (Souter, J., dissenting). The majority in *Heller* v. *Doe*, however, declined to consider whether heightened scrutiny was appropriate, because that issue had not been raised below. See 113 S. Ct. at 2642; see also *id.* at 2650 (O'Connor, J., concurring in the judgment in part and dissenting in part); *id.* at 2651-2652 (Souter, J., dissenting).

There is no occasion in this case to consider whether heightened scrutiny might be appropriate in some circumstances concerning those with mental illness, mental retardation, or other disabilities. As we explain above in connection with Section 504 of the Rehabilitation Act (see pages 9-14, *supra*), this case does not involve a statutory distinction between the mentally ill and others who are not disabled; it concerns a statutory distinction *among* disabled individuals with respect to the type of health services that they will be furnished using state funds under the State's plan implementing the complex federal Medicaid program. Moreover, the trial court made no finding that, in drawing the statutory distinction, the State was acting out of animus toward or a "desire to harm" the mentally ill, *Cleburne*, 473 U.S. at 447; giving effect to negative attitudes of private parties, *id.* at 448; *id.* at 455 (Stevens, J., concurring); or basing its judgment on mere "stereotypical assumptions" regarding the mentally ill, unrelated to the State's administration of its Medicaid program, cf. *Heller* v. *Doe*, 113 S. Ct. at 2657 (Souter, J., dissenting); *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quoting *Mathews* v. *Lucas*, 427 U.S. 495, 520-521 (1976) (Stevens, J., dissenting)). See Pet. App. A2-A5, A15-A19. Whatever the proper analytical approach in other settings involving persons with mental illness, heightened scrutiny is not called for in the circumstances of this case.

c. The trial court's alternative ruling, that the plaintiff class members' interest in obtaining HCBS services to avoid institutionalization implicates a fundamental right that triggers strict scrutiny, is also in error. As this Court held in *Youngberg* v. *Romeo*, 457 U.S. 307, 317 (1982), "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border." That holding encompasses situations in which the provision of services would enable individuals to avoid institutionalization. Mentally ill individuals who are not currently institutionalized thus have no fundamental right to any particular kind of state services. Even when individuals are currently institutionalized, the State "necessarily has considerable discretion in determining the nature and scope of its responsibilities." *Ibid.* Although the State must provide institutionalized persons with "minimally adequate or reasonable training to ensure safety and freedom from undue restraint," *id.* at 319, that obligation does not extend to providing the particular HCBS benefits that respondents seek.

d. The trial court also erred in holding that Colorado's failure to provide HCBS benefits for those suffering from mental illness was not rationally related to a legitimate governmental purpose. In the first place, as the Colorado Supreme Court concluded in its initial opinion, Pet. App. B26, the trial court erred in placing the burden upon respondents to prove such a rational relationship through an evidentiary showing in court. See *Heller* v. *Doe*, 113 S. Ct. at 2642-2643. Moreover, respondents have not challenged the underlying federal statutory and regulatory scheme, which permits States to target particular groups in administering their HCBS waiver programs. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 77 & n.13 (1981). It is only Colorado's determination to act in accordance with that federal scheme (by not reapplying for a waiver for those with mental illness) that is at issue. The State

originally operated a waiver program for individuals with mental illness, applied for its renewal in 1985, and discontinued the program only after its application was denied by HHS. The State's action—which is authorized by a valid federal statute and is the direct consequence of an unchallenged federal administrative determination under that statute that forecloses a source of funding for the services respondents seek—is rationally related to a legitimate governmental purpose. This conclusion is especially appropriate in the area of health care, where there is a particular need to allow for flexibility, at both the state and federal levels, in making difficult decisions about the allocation of scarce resources to meet ever-increasing needs. See *Schweiker* v. *Wilson*, 450 U.S. at 238-239; *Alexander* v. *Choate*, 469 U.S. at 306-307.

3. The judgment below does not warrant plenary review by this Court. Respondents did not challenge, and the trial court's decision did not affect, the validity of either the underlying federal statutory scheme that established the HCBS waiver program or HCFA's denial of the State's waiver application under that scheme in 1985. Because the Colorado Supreme Court merely affirmed the lower court's judgment by an equally divided court, its decision has no precedential force. Moreover, the effect of the decision below extends only to members of the plaintiff class within the State of Colorado, and the trial court or the Colorado Supreme Court presumably could choose to revisit the issue in the future even as regards the continuing force of the injunction in this case. Indeed, the order of affirmance leaves it unclear which of the alternative statutory and constitutional grounds for the trial court's remedial order led three of the seven Justices of the Colorado Supreme Court to vote for affirmance. See Pet. App. C1-C2.

If the Court does not deny review, it may wish to grant the petition, vacate the judgment of the Colorado Supreme Court, and remand the case to that court for further

consideration in light of *Heller* v. *Doe*, *supra*. Compare *INS* v. *Legalization Assistance Project*, No. 93-73 (Dec. 6, 1993) (remanding for further consideration in light of, *inter alia*, *Heller*). *Heller* addressed the rational basis test under the Equal Protection Clause in the specific context of the institutionalization of persons with mental retardation and mental illness. The Court held, contrary to the approach of the trial court in this case, that the burden is on those challenging a statutory distinction on equal protection grounds to negative every conceivable basis that might support the distinction, and that governmental defendants are not required to produce evidence in court to sustain the distinction. See 113 S. Ct. at 2642-2643. In addition, the Court clarified that *Cleburne*, on which the trial court in this case relied, did not call for a different standard of rational basis review. *Id.* at 2643.

The Court's articulation of the rational basis standard in *Heller*, and its clarification of *Cleburne*, are potentially relevant to the disposition of this case, because two of the three Justices of the Colorado Supreme Court who ultimately joined in the affirmance of the trial court's judgment (see Pet. App. C1) had dissented from the Colorado Supreme Court's initial decision reversing the trial court's judgment, contending, *inter alia*, that the statutory scheme fails to satisfy the rational basis standard of review as applied in *Cleburne*. See Pet. App. B40-B44 (Quinn, J., with Lohr, J., dissenting). In these circumstances, a remand would be appropriate to permit those Justices and the remainder of the court to consider the equal protection issue in light of *Heller*. A remand would also afford the Colorado Supreme Court an opportunity for further consideration of the validity of Colorado's program under Section 504 of the Rehabilitation Act of 1973 in light of the views expressed herein.

CONCLUSION

This petition for a writ of certiorari should be denied. In the alternative, the Court may wish to grant the petition, vacate the judgment of the Colorado Supreme Court, and remand the case to that court for further consideration in light of *Heller* v. *Doe*, 113 S. Ct. 2637 (1993).

Respectfully submitted.

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